U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
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CLERK, U.S. DISTRICT COURT
By
Deputy

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE: DISCIPLINE OF WILLIAM HERMESMEYER § § NO. 4:16-MC-017-A §

SUPPLEMENTAL ORDER

The court is issuing this order as a supplement to the July 15, 2016 order in United States of America v. Raul Carrizales-Menchaca, Case No. 4:16-CR-009-A,[1] for the purpose of providing background and context for the court's decision to take disciplinary action against William Hermesmeyer ("Hermesmeyer") on July 15.

The court recognizes that prior to the court's preparation and issuance of this supplemental order, Hermesmeyer filed a notice of appeal from the discipline order. Case No. 4:16-MC-017-A, Doc. 7. The court, nevertheless, is filing this supplemental order because of a belief that its contents will aid the United States Court of Appeals for the Fifth Circuit in evaluating the merits of Hermesmeyer's appeal. See Silverthorne v. Laird, 460 F.2d 1175, 1178-79 (5th Cir. 1972)(in which the Fifth Circuit subscribed to the proposition that "the district court should have full authority to take any steps during the

[1]The July 15, 2016 order appears on the docket of Case No. 4:16-CR-009-A as Doc. No. 28; and, on the docket of this miscellaneous action as Doc. No. 1.

pendency of the appeal that will assist the court of appeals in the determination of the appeal" [quoting from 9 Moore's Federal Practice ¶ 203.11 n. 2]). Descriptions of inappropriate conduct of Hermesmeyer in the handling of other cases before July 15, 2016, help explain the court's decision to impose discipline for his July 15 conduct.

A. Hermesmeyer's Disruptions During Rule 11 Admonishments

1. Descriptions of Hermesmeyer's Disruptive Conduct

Hermesmeyer developed a practice of improperly disrupting the court's Rule 11 penalty admonitions to defendants who were before the court with the intent to plead guilty to a drug offense that authorizes imposition of a life term of supervised release.[2] His disruptions were procedurally and substantively improper. In the ongoing hope that after the court made known to Hermesmeyer the inappropriateness of his conduct there would be no further disruptions, the court did not keep a record of the times when Hermesmeyer engaged in that kind of disruptive conduct, but, with the assistance of its staff, the court has located the following pertinent cases:

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[2]Rule 11(b)(1)(H) of the Federal Rules of Criminal Procedure requires that:

> Before the court accepts a plea of guilty. . . , the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:
>
> . . . .
>
> (H) any maximum possible penalty, including imprisonment, fine, and term of supervised release.

(emphasis added).

2. Specific Cases

a. The Abiles Case

The record of the rearraignment hearing conducted September 13, 2013, as to Jorge Barreto Abiles ("Abiles") in Case No. 4:13-CR-141-A discloses what was probably the first instance of such a disruption. The following occurred as the court was admonishing Abiles as to the penalties to which he was subjecting himself by pleas of guilty to a drug offense (Count One) and a firearm offense (Count Two):

> *THE COURT*: . . . .
>
> If you were to plead guilty to the offense charged by Count 1 of the indictment, you'll be subjecting yourself to these penalties as to that count of the indictment:
>
> A term of imprisonment . . . ; plus, service of a term of supervised release that would have to be at least 4 years, and that would start when you get out of prison, and it could be as much as a full lifetime term of supervised release; . . . .
>
> . . . .
>
> *MR. HERMESMEYER*: Your Honor, if I may, it seems like the Court has added something to what was in the plea agreement and the factual resume with respect to the potential maximum sentence for supervised releases, and we would object to any admonishment different than what is listed in the factual resume.

THE COURT: Which one are you talking about, the Count 1 or Count 2?

MR. HERMESMEYER: Your Honor, I think the Court referred to both counts as having a potential maximum lifetime supervision. And, like I said, we signed up on the factual resume and in the plea agreement for the language that's contained therein, and we would object to an admonishment on any language different than that. Thank you.

THE COURT: I was trying to let the defendant know what he's subjecting himself to, if he pleads guilty, and I'm trying to get you to tell me exactly what your problem is.

As to Count 1, I said he's subjecting himself to a term of supervised released that would be at least 4 years and could be as much as life, which I believe is what the law is, and I want him to understand that.

. . . .

Now, is there something about what I've just said that you disagree with?

MR. HERMESMEYER: Yes, Your Honor. The first bit there with respect to Count 1, the factual resume reads, with respect to supervised release, plus a term of supervised release of not more than 4 years.

There's no further explanation there about a potential for a life period of supervised release and --

THE COURT: Well, I think you're misreading it. It says, not less than 4 years, not -- it does not say, not more than 4 years, which I believe is what you've just said it said. It says, instead, not less than 4 years.

MR. HERMESMEYER: Oh, I apologize, Your Honor. I must have looked right at the word "less" and said the word "more", so let me correct that.

> The factual resume says: Plus a term of supervised release of not less than 4 years, and that's the totality of the admonishment.
>
> *THE COURT*: I understand that's what it says, but I'm trying to tell the defendant, if you won't interrupt and mislead him, that he's also subjecting himself to a lifetime term of supervised release as to Count 1; and I want the defendant to fully understand that, even though it may be unlikely that he would receive such a term of supervised release. That's a possibility.
>
> *MR. HERMESMEYER*: Yes, Your Honor, and we would object to that, that additional bit about a lifetime supervision. I don't think that that is supported by the statutes. I understand there is some law in that regard. However, just for the matter of the record, we do object to that. Thank you.
>
> *THE COURT*: Okay. Well, the record will reflect your objection.
>
> Frankly, I don't know where we were when you interrupted. . . .
>
> Mr. Hermesmeyer, I'm going to have to go over what I've just done because you interrupted before I had a chance to address the defendant as to whether he understood.

Case No. 4:13-CR-141-A, Doc. 39 at 23-27[3] (emphasis added).

The statement by Hermesmeyer that they "signed up on the factual resume and in the plea agreement for the language that's contained therein," Case No. 4:13-CR-141-A, Doc. 39 at 25, is incorrect in one respect, and misleading in another. There was

[3]The "Case No. 4:___-CR-___-A Doc. ___" references are to the applicable criminal case number and the number assigned to the referenced item in that case on the clerk of court's docket.

no plea agreement. Id. at 29. And, Hermesmeyer's suggestion that the factual resume did not disclose that the plea of guilty by Abiles would subject him to a life term of supervised release was directly contrary to the wording of the factual resume signed by Abiles and Hermesmeyer that said that the maximum punishment Abiles may receive following a plea of guilty included "a term of supervised [release] of not less than four years, nor more than life." Case No. 4:13-CR-141-A, Doc. 17 at 2.

b. The Perez Case

The court has located the record of a plea of guilty proceeding in a drug case that occurred before the September 13, 2013 Abiles proceeding mentioned above during which Hermesmeyer, as the attorney appearing for the defendant, failed to object to an admonishment comparable to the Abiles's admonishment relative to supervised release. It was a proceeding conducted July 6, 2012, pertaining to the proposed plea of guilty by Yolanda Gonzalez Perez ("Perez") to a drug offense. Case No. 4:12-CR-098-A, Doc. 62 at 37-38. The point of mentioning this case is not to show improper conduct on Hermesmeyer's part, but it provides further evidence of his awareness that his disruptive conduct was improper in other cases.

The Office of the Federal Public Defender knew by the time Perez pleaded guilty that the "not less than" words used in defining the terms of supervised release to be imposed upon conviction of drug offenses (such as 21 U.S.C. §§ 841(b)(1)(A), (B), (C), (D), and (E)(iii)) meant that the term of supervised release could be a life term. That office (a) signed and approved Perez's plea agreement in which the recitation was made that the maximum penalties the court could impose included "a term of supervised release of not less than three (3) years and up to life," Case No. 4:12-CR-098-A, Doc. 22 at 2, ¶ 3.c., and (b) agreed and stipulated in Perez's factual resume that "a term of supervised release of not less than three (3) years and up to life . . . will follow any term of imprisonment, id., Doc. 21 at 1.

c. The Ayala Case

On April 3, 2015, in Case No. 4:15-CR-022-A, Hermesmeyer disrupted the court's admonishment to Erica Ayala ("Ayala") and another defendant concerning the penalties to which they were subjecting themselves by pleas of guilty to a drug offense. The following occurred:

> *THE COURT*: . . . . The next thing is directed again to defendants Ayala and Rosemergy, and it's the penalties you're subjecting yourself to by a plea of guilty to the offense charged by the indictment in your case, and those penalties are:
>
> A term of imprisonment . . . ; plus, service of a term of supervised release that would have to be at

least 4 years and could be more, it could be as much as life . . . .

. . . .

Defendant Ayala, do you understand you're subjecting yourself to all of those penalties and punishments that I've just described if you plead guilty to the offense charged by the indictment?

DEFENDANT AYALA: Yes, Your Honor.

MR. HERMESMEYER: Your Honor, if I may? The Court had indicated in its admonition, regarding the supervised release term, that it could be up to life. To the extent necessary, we would object to that.

THE COURT: Pardon? I can't tell what you're saying, Mr. Hermesmeyer. Come up to the microphone, so you can talk into the microphone.

MR. HERMESMEYER: Your Honor, where would you like me to begin?

THE COURT: Well, where you started mumbling.

MR. HERMESMEYER: And where was that?

THE COURT: At the very beginning.

MR. HERMESMEYER: Okay. Very good.

Your Honor, the Court indicated in its admonition that the term of supervised release could be up to life in this case.

Your Honor, the factual resume states that the supervised release is a period of not less than 4 years. That is what the statute says. That tracks with the statute. There is no language in the statute that states that the supervised release could be up to life.

Your Honor, we object to that admonition for the record and for the future issues on appeal were it to come up. Thank you.

THE COURT: Mr. Hermesmeyer, that's not the first time you've done that, and I think the case law makes real clear that it could be up to life.

Are you aware of any authority that supports your interruptions, as we go along in these cases, to make that point?

MR. HERMESMEYER: Your Honor, such an argument has been presented to the Supreme Court in a case I believe named O'Bri[e]n. I don't think that the Supreme Court took up that case. Nonetheless, it was -- it was presented in the arguments to the Court in the litigation in that case.

THE COURT: Are you aware of any authority that supports what you're doing in interrupting these proceedings with that objection?

MR. HERMESMEYER: Your Honor, I'm not really sure I understand the Court's question, but --

THE COURT: Authority is something that a Court has decided.

MR. HERMESMEYER: Your Honor, I think the best way I could respond to that --

THE COURT: The best way to respond is to respond directly.

Are you aware of any Court authority that supports interruptions you have made more than once, based on the argument you've just made?

MR. HERMESMEYER: Yes, Your Honor.

THE COURT: And what is that?

MR. HERMESMEYER: Your Honor, the authority would be up the lines of preserving an issue for appeal in the event that --

THE COURT: Mr. Hermesmeyer, go back and get -- you won't respond to my question. Go back and get in line, and we'll move on.

. . . .

MR. HERMESMEYER: Would you like me to stand next to my client now? Is that what the Court's indicated?

THE COURT: I'd like for you to get back where you were when you interrupted the proceedings.

MR. HERMESMEYER: Okay. Thank you, Your Honor.

THE COURT: Okay. Now that he's interrupted the proceedings, I feel like I need to go back and be sure we have a clear understanding of what penalties Ms. Ayala and Ms. Rosemergy are subjecting themselves to by a plea of guilty.

Each of you is subjecting yourself to service of a term of imprisonment . . . ; plus, service of a term of supervised release that would have to be at least 4 years and could be as much as life; . . . .

. . . .

Defendant Ayala, do you understand you're subjecting yourself to those penalties and punishments if you plead guilty?

MR. HERMESMEYER: Your Honor, Ms Ayala would respond in the affirmative, taking into account --

THE COURT: I'm talking to her, Mr. Hermesmeyer, not you.

Ms. Ayala, do you understand that you're subjecting yourself to those penalties and punishments if you plead guilty to the offense charged by the indictment in this case?

> *MR. HERMESMEYER*: May I be heard prior to her responding, Your Honor?
>
> *THE COURT*: Ms. Ayala, will you answer my question:
>
> Do you understand you're subjecting yourself to those penalties and punishments if you plead guilty to the offense charged by the indictment in this case?
>
> *DEFENDANT AYALA*: Yes, Your Honor.

Case No. 4:15-CR-022-A, Doc. 81 at 17-21 (emphasis added).

On April 6, 2015, Hermesmeyer filed in Case No. 4:15-CR-022-A a document titled "Objection to Fed.R.Crim.P. 11(b)(1)(H) Address and Notice of Authority for Objection" in which he provided as his justification for his disruptive conduct at the Ayala rearraignment hearing the fact that, he asserted, three Supreme Court justices indicated during the oral argument in United States v. O'Brien, 560 U.S. 218 (2010) "that it is doubtful that 'not less than' language creates a term up to life," Case No. 4:15-CR-022-A, Doc. 29 at 2; Attach. A. Hermesmeyer also made reference to an unsuccessful petition for writ of certiorari that had been filed in United States v. Lucas, 670 F.3d 784 (7th Cir. 2012), cert. denied, 133 S. Ct. 2849 (2013), Case No. 4:15-CR-022-A, Doc. 29 at 2-3; Attach. B.

d. The Resendiz Case

Hermesmeyer disrupted the court's admonition to Francisco Resendiz-Casarez ("Resendiz") on August 14, 2015, in Case No. 4:15-CR-149-A, when the following occurred:

> *THE COURT*: Now, the next thing I'm going to go over is the punishment you're subjecting yourself to if you plead guilty to the offense charged by the indictment in this case, and those -- and that's something that's on the first page of this factual resume we talked about a minute ago.
>
> That punishment could be as much as a term of imprisonment . . . ; plus, service of a term of supervised release, and it would have to be at least 3 years and could be as much as life . . . .
>
> *MR. HERMESMEYER*: Your Honor, I'm sorry. I think I heard the Court say something about supervised release for life.
>
> Was I hearing correctly?
>
> *THE COURT*: You heard correctly that he's subjecting himself to a term of supervised release that would have to be 3 years and could be as much as life.
>
> *MR. HERMESMEYER*: Your Honor, if it --
>
> *THE COURT*: Mr. Hermesmeyer, that's what the law says he's subjecting himself to, and let's don't take up time with what you've been going through on prior occasions. Let's move on. He's entitled to know what he's subjecting himself to.
>
> *MR. HERMESMEYER*: Your Honor, may I object to the Court's admonishment?
>
> *THE COURT*: Let's go on with what the defendant's subjected to. I understand you've made an objection.

Mr. Hermesmeyer, is it that you don't want your client to know what his potential penalties are?

MR. HERMESMEYER: Your Honor, it is a legal objection. It's been well explained to the Court. Your Honor, we do object to the --

THE COURT: Well, Mr. Hermesmeyer, don't you understand you can make that objection on appeal if it turns out your client gets a sentence that he shouldn't receive and if you make that objection at the time of sentencing?

Why are you taking up the Court's time now to do that?

MR. HERMESMEYER: Your Honor, I believe it would be in the court -- I'm sorry, in the case of Almendarez-Torres with the Supreme Court, wherein the Supreme Court noted that one of the problems with the process that went through, underlying the case, was that the defendant Almendarez-Torres had not objected and brought the issue to the Court's attention at the time of his plea with respect to the maximum sentence in the case. We're making the objection in accordance with that law.

We do object, Your Honor, to the Court's admonishment that the supervised release can be up to life. Thank you.

THE COURT: . . . .

Now, let me start over again. Because of your interruption, it's not -- I want to be sure the defendant understands what he's subjecting himself to.

Case No. 4:15-CR-149-A, Doc. 25 at 3-5 (emphasis added).

3. Justifications Hermesmeyer Provided for the Disruptions

Immediately after the exchange quoted above, the court directed Hermesmeyer to file later in the day on August 14, 2015, "a memorandum that supports, legally, your obligation to object at a rearraignment hearing to the statement that the term of supervised release could be as much as life." Id. at 6. The afternoon of August 14, 2015, Hermesmeyer filed a document titled "Response to Oral Order of Court Made During August 14, 2015 Plea Hearing," in which he acknowledged that he was in error when he said that his disruption was justified by something the Supreme Court said in Almendarez-Torres. Case No. 4:15-CR-149-A, Doc. 22 at 1-2. He cited as authority in support of his rearraignment disruptions United States v. Roussel, 705 F.3d 184, 202-203 (5th Cir. 2013) and Rule 51 of the Federal Rules of Criminal Procedure, neither of which remotely supports the proposition that an interruption by defense counsel during the penalty admonishment is necessary for the defendant to preserve on appeal a complaint that the defendant received a sentence greater than counsel for defendant thinks was authorized.

Three days later, on August 17, 2015, Hermesmeyer made a filing in Case No. 4:15-CR-149-A that was virtually identical to the one he made on April 6, 2015, in Case No. 4:15-CR-022-A, supra at 11-12, in which he again appeared to be attempting to justify substantively his repeated disruptive conduct by the comments made by three justices during oral argument in O'Brien and the unsuccessful petition in Lucas, Case No. 4:15-CR-149-A, Doc. 24.

4. Hermesmeyer's Disruptions During Rule 11 Admonishments Were Not Procedurally or Substantively Appropriate

a. The Disruptions Were Not Procedurally Appropriate

The Fifth Circuit decision and the rule of criminal procedure that Hermesmeyer referenced in his August 14, 2015 filing in response to the court's directive that he file on that date "a memorandum that supports, legally, [his] obligation to object at a rearraignment hearing to the statement that the term of supervised release could be as much as life" (Case No. 4:15-CR-149-A, Doc. 25 at 6) do not provide support for Hermesmeyer's contention that he has such an obligation.[4] Obviously, such an objection, even if meritorious, would not be required at that time.

Hermesmeyer, on behalf of his client, more appropriately would make such an objection at the sentencing hearing if the actual sentence imposed included a term of supervised release greater than Hermesmeyer thought appropriate. Such an objection would be sufficient to support that issue on appeal if his client were to receive a term of supervised release greater than Hermesmeyer thought he should receive.

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[4]The Fifth Circuit case Hermesmeyer cited in his August 14, 2015 filing in support of his disruptive conduct was United States v. Roussel, 705 F.3d 184, 202-03 (5th Cir. 2013) and the rule of procedure he cited was Rule 51 of the Federal Rules of Criminal Procedure. Case No. 4:15-CR-149-A, Doc. 22 at 2.

b. The Disruptions Were Substantively Unfounded

The only authorities Hermesmeyer provided in support of the substance of his disruptions of the court's penalty admonishments do not justify his conduct, but, rather, provide authority that his conduct was substantively insupportable.

(1) Hermesmeyer's Reliance on Comments during the *O'Brien* Oral Argument

While relying in support of his disruptions on comments of three Supreme Court justices during the oral argument in United States v. O'Brien, Case No. 4:15-CR-022-A, Doc. 29, Attach. A; Case No. 4:15-CR-149-A, Doc. 24, Attach. A, Hermesmeyer failed to disclose in his filings that the majority opinion and each of the concurring opinions in O'Brien recognized that the "not less than" language in 18 U.S.C. § 924(c)(1)(A)(i), did, in fact, authorize imposition of a life term of imprisonment. The majority said things from which one can infer that it recognized that the "not less than" language authorized a term of imprisonment in excess of the minimums stated in the statute. O'Brien at 221, 230, 232. Justice Stevens said in his concurring opinion that a statutory punishment scheme using the "not less than" language "contains an implied statutory maximum of life," id. at 238 (Stevens, J., concurring), adding that "[t]here is, in this type of case, no ceiling, there is only a floor below which the sentence cannot fall," id. And, Justice Thomas noted in his concurring opinion that the "not less than" language used in § 924(c)(1) authorized a sentence to a term of imprisonment of life. Id. at 241 (Thomas, J., concurring).

(2) Hermesmeyer's Reliance on the *Lucas* Petition

The other authority upon which Hermesmeyer relied as providing substantive support for his disruptions was the text of the unsuccessful petition for writ of certiorari in Lucas. Case No. 4:15-CR-022-A, Doc. 29, Attach. B; Case No. 4:15-CR-149-A, Doc. 24, Attach B. The most important part of the Lucas petition from the standpoint of whether there is substantive merit to Hermesmeyer's disruptions is its author's admission that "Every Circuit To Address The Issue Has Held That Subsection 924(c)(1)(A) Creates A Statutory Maximum Of Life Imprisonment By Implication." Case No. 4:15-CR-022-A, Doc. 29, Attach. B at 7; Case No. 4:15-CR-149-A, Doc. 24, Attach B at 7. In the Seventh Circuit's Lucas opinion, the Court cited to the then-existing decisions of other circuits that agreed with the Seventh Circuit's holding that the "not less than" language used in 18 U.S.C. § 924(c)(1)(A) authorized, by implication, a sentence of life imprisonment, regardless of which subsection the defendant is sentenced under. Lucas, 670 F.3d at 785-86.

(3) There Simply is No Authority That Provides Substantive Support for Hermesmeyer's Objections

In Custis v. United States, the Supreme Court held without qualification that the "not less than" penalty language in 18 U.S.C. § 924(e) created "a mandatory minimum sentence of 15 years and a maximum of life in prison without parole."[5] 511 U.S. 485, 487 (1994). A similar result was reached by the Supreme Court in Harris v. United States, 536 U.S. 545, 554 (2002). In his dissenting Harris opinion, Justice Thomas clarified what was only implied in the majority opinion that the "not less than" penalty language in 18 U.S.C. § 924(c)(1)(A) authorized by implication imposition of a life sentence on a person guilty of one of the described offenses. Id. at 575-76 (Thomas, J., dissenting). The Fifth Circuit held in United States v. Sias that the "not less than" language used in § 924(c)(1)(A)(ii) was "designed to serve as the floor, not the ceiling, for sentences imposed thereunder." 227 F.3d 244, 247 (5th Cir. 2000).

Needless to say, if "not less than" language in a penalty statute authorizes by implication imposition of a life term of imprisonment, there certainly would be no rational basis for argument that the "not less than" supervised release language found in 21 U.S.C. § 841(b) does not authorize by implication a life term of supervised release. In United States v. Jackson, the Fifth Circuit held that such an implication is proper in a supervised release context, and that as presently worded § 841 contemplates that punishment for the offenses described therein "may include lifetime supervised release." 559 F.3d 368, 370-71 (5th Cir. 2009)(citing H.R. Rep. No. 107-685 at 188-89 (2002)(conf. rep.))(internal quotation marks omitted).

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[5]Section 924(e)(1) of Title 18 provides for a penalty in the form of a term of imprisonment of "not less than fifteen years" if specified facts exist.

Since Jackson, the Fifth Circuit repeatedly has recognized or approved imposition of a life term of supervised release based on the "not less than" supervised release language. See United States v. Torres-Vasquez, 515 F. App'x 261 (5th Cir. 2013); United States v. Cardenas, 531 F. App'x 530 (5th Cir. 2013)(noting that the district court had complied with Rule 11 by admonishing the defendant that he faced a sentence that included "three years to life supervised release"); United States v. Black, 455 F. App'x 412, 412-13 (5th Cir. 2011)(holding that "[s]ince § 841(b)(1)(B) does not specify a maximum term of supervised release, the maximum is life."); United States v. Villarreal, 447 F. App'x 586 (5th Cir. 2011)(involving a complaint by the defendant that the trial court erred in failing to admonish him at his guilty plea hearing that he faced a statutory maximum term of life of supervised release); United States v. Berry, 441 F. App'x 284 (5th Cir. 2011); United States v. Manzanares, 435 F. App'x 366 (5th Cir. 2011); United States v. Gonzalez, 625 F.3d 824, 826-27 (5th Cir. 2010); United States v. Rosales, 341 F. App'x 65, 66 (5th Cir. 2009); United States v. Zuniga, 312 F. App'x 653, 654 (5th Cir. 2009). While the unreported Fifth Circuit cases do not constitute precedent, they serve to illustrate the frequency with which a life term of supervised release is imposed in drug cases and the corresponding importance of compliance by district courts with the Rule 11 mandate that at the rearraignment hearing the defendant be admonished concerning "any maximum possible penalty, including . . . term of supervised release." Fed.R.Crim.P. 11(b)(1)(H).

Indeed, in United States v. Rios, 600 F. App'x 256, 257 (5th Cir. 2015), the defendant's complaint was that the district court erred in failing to advise him at the rearraignment hearing that the maximum term of supervised release was life. The giving of such an admonishment is noted in district court decisions. See, e.g., United States v. Ramirez, Cr. No. C-09-1063, C.A. No. 6-12-126, 2013 WL 100266, at *1 (S.D. Tex. Jan. 4, 2013); United States v. Silvas, Cr. No. C-08-613, C.A. No. C-09-123, 2010 WL 2680594 at *5 (S.D. Tex. June 30, 2010); United States v. Moore, CR. No. C-05-542(1), C.A. No. C-08-202, 2009 WL 594473, at *14 (S.D. Tex. Mar. 6, 2009); United States v. Cuellar, CR. No. C-06-638, C.A. No. C-07-364, 2008 WL 657122, at *6 (S.D. Tex. Mar. 3, 2008); United States v. Lockett, No. CR. C-04-367, C.A. C-05-430, 2006 WL 456248, at *5 (S.D. Tex. Feb. 24, 2006); United States v. Heinaman, No. CR C-01-360(3), CA No. C-05-172, 2005 WL 2171886, at *4 (S.D. Tex. Sep. 6, 2005). It certainly is required by Rule 11.

c. The Court Cannot Recall, or Find a Record, That Any Other Attorney Has Engaged in Similar Conduct

So far as the court can recall or determine, no Assistant Federal Public Defender other than Hermesmeyer, nor for that matter any other criminal defense attorney who has appeared before the undersigned, has contended that the "not less than" language used in 21 U.S.C. §§ 841(b)(1)(A), (B), (C), (D), and (E)(iii) does not authorize the court to impose a life term of supervised release.

The court has seen no evidence in any court decision, including the many the court has reviewed in the course of preparing this supplemental order, that any attorney has disrupted another judge's Rule 11 plea admonishment with a contention that the judge incorrectly informed the defendant in a drug case that he was subjecting himself by a plea of guilty to service of a life term of supervised release.

5. Interim Conclusion

So far as the court has been able to determine, Hermesmeyer's disruption during the court's admonition in the Resendiz case is the last time Hermesmeyer engaged in that precise kind of misconduct. It might well be the case that Hermesmeyer has not had an opportunity since Resendiz to cause a similar disruption. Whether he has or has not, the foregoing provides illustrations of the level of disrespect of the court Hermesmeyer has displayed and the court time that has been wasted because of his disruptive activities. Another example is discussed below.

B. Hermesmeyer's Inappropriate Conduct in the *Steinberg* Case

A standard provision in the court's scheduling orders in criminal cases requires the attorneys to present to the court in advance of trial a jointly approved court's charge to the jury, with indications in the document of any areas of disagreement. Such an order was entered in Case No. 4:15-CR-089-A, styled "United States of America v. Martin Jacob Steinberg." Case No. 4:15-CR-089-A, Doc. 15 at 4-6. The government filed on June 11, 2015, what it said was the agreed charge. Id., Doc. 21. Hermesmeyer, on behalf of Steinberg, made puzzling objections to language proposed by the government for inclusion in the charge. Id. at 8-10.

To try to understand Steinberg's objections, the court held a telephone conference on June 12, 2015, with the attorney for the government and Hermesmeyer on the line. Id., Doc. 24. The court was not successful. Instead, the court received responses from Hermesmeyer that were not unlike the responses that led to the discipline order now under consideration. At pages 5-8 of the transcript of the telephone conference, the following exchanges occurred:

> *THE COURT:*
>
> . . . .
>
> Now, the next issue has to do with the elements of the crime of knowingly and intentionally possessing a controlled substance with intent to distribute it. And we have the elements that the government proposes, which is what we always use in our Court's Charges, and then we have Mr. Hermesmeyer's objections to those elements.
>
> And Mr. Hermesmeyer, I can't see any substance to your objection in that I don't see how it changes what the government's proposed.
>
> Can you tell me what it is about your proposal that is substantially different -- substantively different from what the government proposes?
>
> *MR. HERMESMEYER:* Your Honor, first off, with respect to the language in the document that the government submitted, the agreed Charge, I did notice that in the letter that I sent to the government, it omitted the word "to", T-O.

So the objection ought to read in the paragraph that begins, the criminal offense states in relevant part that, and then it begins to quote, I omitted the "to" before the verb "possess," or it should be -- it should be quoting: It shall be unlawful for any person knowingly or intentionally to possess with intent to distribute a controlled substance. And I think I did the same thing -- well, okay. That's it. So, I did leave out the word "to."

The Court was inquiring about the substance. I would rely on the statute as it is and the objection that we've stated with respect to the substance. The statute would require a jury determination that the case involved at least 50 grams of methamphetamine to trigger the (b)(1)(B) provision of Section 841 in Title 21, and that's the reason that we've stated the elements the way we've stated them.

The offense is possession of a controlled substance with the intent to distribute, with an additional determination that the case involved at least 50 grams of methamphetamine as the government's alleged it.

THE COURT: You don't know of any case authority that supports your position on the Charge being worded the way you want it worded on that subject, as opposed to the way the government wants it worded?

MR. HERMESMEYER: Do I know of any case law? I don't have any case law to present to the Court. I have the statute language.

THE COURT: I didn't ask you about that. I asked you if you know of any case law that supports your position on that subject.

MR. HERMESMEYER: No, I -- I'm trying to think how to respond to that.

THE COURT: Well, you can either say yes or no, and then we'll go further if you say yes.

MR. HERMESMEYER: Okay. All right. Here again, I'm sorry I wasn't prepared to have to address that.

THE COURT: Pardon?

MR. HERMESMEYER: Pardon me?

THE COURT: I didn't hear what you said, Mr. Hermesmeyer. Why don't you speak up and be responsive and let's don't play games. Let's move on.

Do you know of any case law that supports your position on --

MR. HERMESMEYER: Your Honor, I'm not presenting any case law to the Court on this as --

THE COURT: Are you aware of any?

MR. HERMESMEYER: Your Honor, there is case law. I would refer to Apprendi to begin with, and I would suppose go from that.

THE COURT: Okay. Apparently you don't know of any case law, so I'm not going to use your -- I'm overruling that objection, and I'll use the government's format.

Mr. Hermesmeyer, you're going to have to straighten your act up. There's a limit on how much patience I can have with your kind of conduct and the evasiveness when you purportedly respond to my questions.

Case No. 4:15-CR-089-A, Doc. 24 at 5-8.

Only moments later, the court again was faced with Hermesmeyer's unwillingness to be cooperative in helping the court understand the nature of his objections. This time, the following exchanges are reflected by the transcript of the telephone conference:

THE COURT: Okay. Now, the next objection I have is related -- or the next disagreement I have is related to the elements of the firearm offense, and I believe what the government has proposed is what we always use in the Charges on a firearm offense, and I'm having -- again, having trouble seeing what, if any, substantive difference there is between what the government's proposing and what you're proposing, Mr. Hermesmeyer.

Can you tell me what the difference is, substantively?

MR. HERMESMEYER: Your Honor, I'm just going to rely on the objection that has been recited in the document that the government presented in their agreed Charge.

THE COURT: I'm sorry, what is the substantive difference between what the government has proposed and what you're proposing?

MR. HERMESMEYER: Your Honor, the language that I'm proposing tracks the statute.

THE COURT: Are you willing to tell me what the substantive difference is?

MR. HERMESMEYER: Your Honor, I'm going to stand on what I've already advised the Court.

THE COURT: Okay. Mr. Hermesmeyer, you have just disregarded a special -- a specific question I asked, and you have refused to answer it. I'm holding you in -- well, I'm going to give you an opportunity to tell me why you should not be held in civil contempt, and then I'll consider holding you in civil contempt of court for failing to comply with my instruction that you tell me what the substantive difference is.

Do you want to offer any defense for your failure -- I'll tell you what. We'll have a hearing on this, and we'll deal with this in open court so there won't be any question about the propriety of whatever

> sanctions the Court might impose on you, Mr. Hermesmeyer.
>
> So we'll set a hearing on this matter for -- let's see if we can do it at 11:00 this coming Monday.
>
> And Mr. Hermesmeyer, I suggest that you give some serious consideration to the way you conduct yourself when I'm trying to have an intelligent discussion over whether objections you've made to certain things are appropriate.

Id. at 8-10.

On June 15, 2016, the court had a hearing to further discuss Steinberg's objections to the government's proposed language in the agreed charge. Id., Doc. 56. Shortly before the hearing was to commence Hermesmeyer filed a motion to dismiss the charges in the superseding indictment and a motion for leave to file defendant's requested additional jury instructions, objection to the government's proposed instructions, and proposed alternative instructions, which was accompanied by the document for which leave to file was being sought. The newly filed documents did not provide reasoned clarification of Hermesmeyer's objections. Id., Docs. 28 and 32.

At the June 15 hearing, the court started by arraigning Steinberg on a superseding indictment. It turned out that Hermesmeyer had not provided his client a copy of the superseding indictment, and could not provide an explanation as to why he failed to do so. Case No. 4:15-CR-089-A, Doc. 56 at 7. Then the court dealt with the motion to dismiss Hermesmeyer had filed shortly before the start of the hearing. The court denied that motion after a brief, non-productive discussion with Hermesmeyer relative to any case law there might be in support for the motion. Id. at 10-11. Hermesmeyer informed the court that the objections to the agreed charge he filed shortly before the hearing commenced were to replace the objections the court was trying to understand at the June 12 telephone conference. Id. at 12-13. He explained the first of his new objections as follows:

> *MR. HERMESMEYER:*
>
> . . . .
>
> Your Honor, the theory behind -- the legal theory behind the entirety of the objections is essentially that the statutes involved, 21 United States Code 841(a)(1) and 18 United States Code 924(c)(1), work together to create a single offense of possession with intent to distribute a controlled substance, and using -- or I'm sorry, in this case possessing in furtherance of that possession with intent to distribute a firearm.
>
> *THE COURT:* Is it your position that Counts 1 and 2 of the indictment are simply alleging a single offense?
>
> *MR. HERMESMEYER:* Yes, Your Honor.

Id. at 14. When asked if he was aware of any court decision that supported the proposition he was advancing, he informed the court that he was aware of three. Id. Those three court decisions were Winship, Gaudin, and Apprendi.[6] Id. at 16. When asked to refer to the specific language in each of those cases that he contended supported his proposition that Counts One and Two of the indictment simply allege a single offense, he read language from each of them that did not appear to have any relevance to the proposition he was advancing. Id. at 18-20.

When the court sought to gain an understanding of a proposed alternative instruction for inclusion in the court's charge that Hermesmeyer was advocating, Hermesmeyer responded with virtual nonsense. Id. at 23-24.

For all practical purposes, the court wasted the court's time and the time of counsel for the government in having the June 12 telephone conference and the June 15 hearing. At the conclusion of the hearing, the court made known to Hermesmeyer in no uncertain terms that he needed to straighten up his act, and that his conduct had been such that the court had a question as to whether an attorney engaging in the kind of conduct he engaged in should be practicing before this court. Id. at 24-25.

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[6] Apprendi v. New Jersey, 530 U.S. 466 (2000); United States v. Gaudin, 515 U.S. 506 (1995); In re Winship, 397 U.S. 358 (1970).

C. Hermesmeyer Had Reason to Know That His Conduct That Led to the Disciplinary Order of July 15, 2016, Was Inappropriate and Could Subject Him to Disciplinary Action

Hermesmeyer's July 15, 2016 conduct was not unlike conduct in which he had engaged on prior occasions that led to expressions of concern by the court. At the July 15 hearing, the following transpired:

> *THE COURT:* . . . . There were some -- there were two objections filed, and I believe both of them were related to the possibility of a sentence above the top of the advisory guideline range.
>
> Did I read those correctly, Mr. Hermesmeyer?
>
> *MR. HERMESMEYER:* Your Honor, I think they have more to do with legality of whether such a sentence would be permissible or appropriate.
>
> *THE COURT:* I'm sorry, I was wondering if I'm correct in thinking that both of the objections have to do with the possibility of a sentence above the top of the advisory guideline range.
>
> What is the answer to that?
>
> *MR. HERMESMEYER:* Your Honor, just what I said.
>
> *THE COURT:* I'm not sure I understood how that answered my question.
>
> I've asked the question again. Would you please answer the question either yes or no.
>
> *MR. HERMESMEYER:* Your Honor, I would stand on what I previously said. Thank you.
>
> *THE COURT:* Mr. Hermesmeyer, you get very close to being held in contempt of court.
>
> Would you answer my question?

> *MR. HERMESMEYER:* I have no further response, Your Honor.
>
> *THE COURT:* Okay. Mr. Hermesmeyer, I've ordered you to answer my question, and you've refused to answer it. I consider that you're in civil contempt of court, and also you're in violation of one of the local rules that requires attorneys to appropriately conduct themselves and to respond and answer orders of the Court.
>
> I'm going to give you another opportunity to answer my question. And if you would like, if you decline to answer my question, I'll give you an opportunity at this time to respond to my suggestion that you will be held in civil contempt of court and held in violation of the local rule concerning the conduct of attorneys, if you refuse to answer my question.
>
> You may proceed.
>
> (Pause in proceedings)
>
> *THE COURT:* Okay. Apparently you're not going to respond. I'm ordering that you are in violation of the local rule.

Case No. 4:16-MC-017-A, Doc. 2 at 4-6.

Rather than to seek to correct the problem that led to the court's conclusion that discipline was appropriate, Hermesmeyer moved to withdraw from the representation of defendant Carrizales. Id. at 6. Hearing nothing further from Hermesmeyer on the subject of the court's concerns, the court, pursuant to Local Criminal Rule LCrR 57.8(b), disciplined Hermesmeyer for engaging in conduct unbecoming a member of the Bar and for failure to comply with an order of the court. Id. at 6-7.

He was adequately warned on July 15, 2016, and knew from previous warnings from the court that he was at risk of discipline.

SIGNED August 4, 2016.

JOHN McBRYDE
United States District Judge